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Supreme Court, U.S.
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NO. _____

In the Supreme Court of the United States

OCTOBER TERM, 1988

PATSY CAROLYN POE ..... PETITIONER

V.

DONNIE HAYDON, ROBERT S. SMITHER, JOHN S. SPICER, LOWELL CLARK, JAMES E. STEWART, TONY MILLER AND VENTRA HAMMOND ..... RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a public employee's §1983 action for acts of employment-related sex discrimination, where only the motive for the specific acts for which Defendants claimed qualified immunity was disputed, is the factual issue of whether that conduct was the result of intentional gender-based discrimination a matter for resolution on Defendants' Rule 56 qualified immunity motion, or is it a matter for trial?

2. Where a Rule 56 qualified immunity motion is made after full discovery had occurred, must the §1983 Plaintiff show that the §1983 defendant is not entitled to the defense, or must the §1983 defendant show that he is?

3. Does the answer of eleven (11) §1983 Defendants, amended after full discovery had occurred to allege that "(s)ome of the Defendants, as executive officials of the State, are immune from personal liability," sufficiently assert immunity from personal liability for all Defendants, and the privilege of qualified immunity against subjecting Defendants to trial?

4. Where individual §1983 Defendants had not challenged the sufficiency of the complaint in the light of qualified immunity, and their purported plea of qualified immunity was not made until after all Defendants had voluntarily submitted to depositions, and the dis-

QUESTIONS PRESENTED FOR REVIEW (continued)

covery deadline had passed, was there a waiver of the defense, and its privilege against subjection to trial?

5. Must a §1983 Plaintiff, claiming deprivation of Equal Protection because of public employment sex discrimination, present direct evidence of discriminatory intent to defeat a Rule 56 qualified immunity motion?

6. Where a §1983 plaintiff claimed that some of her superiors "acquiesced in, condoned and ratified" public employment-related sexual harassment by taking adverse employment action against her after she complained of sexual harassment by her immediate supervisor, do the offending superiors escape personal liability, if the Plaintiff cannot show that those superiors actively participated in or authorized the specific incidents of harassment of which she complained?

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NO._____

In the Supreme Court of the United States

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PATSY CAROLYN POE ..... PETITIONER

V.

DONNIE HAYDON, ROBERT S. SMITHER, JOHN S. SPICER, LOWELL CLARK, JAMES E. STEWART, TONY MILLER AND VENTRA HAMMOND ..... RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Patsy Carolyn Poe, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 28, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as *Poe* v. *Haydon,* 853 F.2d 418 (6th Cir., 1988), and is reprinted in the appendix hereto, p.1a, *infra.*

JURISDICTION

The Court of Appeals for the Sixth Circuit issued its opinion on July 28, 1988. No petition for rehearing was filed. This Petition is filed within 90 days after the entry of the judgment below.

The jurisdiction of this Court to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

U. S. CONSTITUTIONAL PROVISION INVOLVED

FOURTEENTH AMENDMENT

> Section 1. . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

This cases involves 42 U.S.C. §1983, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In July, 1984, Petitioner (Poe), a female merit employee of the Commonwealth of Kentucky was transferred to the Kentucky State Capitol Building on the night shift in her capacity as a janitor. In September, 1984, J. L. Henderson (a defendant in the trial court, but not a party to the appeal) became her night shift supervisor.

During November and early December, 1984, Henderson subjected Poe to a succession of sexual assaults on the job. In order of occurrence, and on different nights, Henderson committed the following acts: he grabbed her around the waist, saying he "wanted this 36-year old grandmother"; he came up behind her and patted her "on the butt"; he came to where she was cleaning, sneaked up behind her, threw his arms around her, and grabbed her by the breast; when she and Henderson were riding the elevator from the third to the first floor of the Capitol, he grabbed her arm, held her against the wall, pressed up against her and tried to kiss her; he followed her down the hall and tried to follow her into the women's restroom, but was prevented from doing so by the Capitol Security Guard. All advances were repulsed by her. All were witnessed by Poe's co-workers, or the Security Guard, except the episode on the elevator and the one when Henderson grabbed her breast.

Respondent, Haydon, was the day shift supervisor, but became Poe's "main boss" in September or October

of 1984. In late November or December, 1984, in the company of a co-worker, Poe went to Haydon, and told him that she was having trouble with a man on the night shift, and requested a transfer to the day shift. Poe declined to identify Henderson for fear of getting fired. Haydon did nothing except tell her that if she was unable to take care of it herself, to get back with him.

Thereafter, on December 4, 1984, Henderson came to the room where Poe was working and suggested that they "have an affair." When she responded in the negative, Henderson engaged in conduct which could best be described as an attempted rape. Poe was so upset by this, that she went home early.

By letter of December 10, 1984, addressed to Respondent, Smither, with copies to Respondents, Haydon, Spicer, Stewart and Hammond, Poe complained of Henderson's sexual harassment of her. She requested that she be left alone to do her job without being harassed, that she not lose her job, or be transferred out of the Capitol. Haydon admitted to Poe that he knew something was going on, because whenever he came to the Capitol at night, Henderson was either where Poe was, or heading to where she was.

Haydon, Spicer and Smither met with Henderson that day, but talked to none of Poe's witnesses. Henderson denied everything, including his witnessed conduct. Although he stated that it was "one person's word against the other's," the next day, Haydon changed the

conditions of Poe's employment by assigning two male janitors to work with her at all times, as a buffer against Henderson.

On December 19, 1984, Hammond, whose responsibility was investigating employment discrimination complaints, despite corroborating witnesses to most of Poe's complaints, parroted Haydon's exact words, i.e., "one person's word against the other's."

On December 20, 1984, because of the humiliating requirement of working with the two male janitors at all times, and because Henderson's denials were given credence by her superiors, Poe took a medical leave of absence.

By letter dated February 20, 1985, Respondent, Stewart, informed Poe that the investigation of her charges against Henderson had been inconclusive and gave her four options: (1) return to her regular shift in the Capitol, (2) accept a transfer to the Capitol Annex Building, (3) request a medical leave without pay, or (4) submit a letter of resignation.

By letter, Poe elected to return to her regular shift at the Capitol, stating that she did not want anyone assigned to her for protection against Henderson. She returned to her regular shift on March 1, 1985. Because no significant steps had been taken to resolve her sexual harassment claim against Henderson, Poe filed a sexual harassment charge against him with the EEOC on March 28, 1985. Claiming that they believed that Henderson was still harassing her as of March 28, 1985,

Smither, Clark and Haydon, transferred Poe from the Capitol Building to the Capitol Annex Building on May 8, 1985.

Because working conditions and the opportunity for extra pay are better in the Capitol than in the Capitol Annex, and because it was true, Poe immediately told Clark that she had had no trouble with Henderson since reporting back to work on March 1, 1985. She explained that she had been to the EEOC in February, but that the charges were dated March 28, 1985, because that was the date she signed them. Nevertheless, Clark refused to transfer Poe back to the Capitol.

On December 3, 1985, Poe filed her fact-specific Complaint, in the U.S. District Court for the Eastern District of Kentucky at Frankfort, under 42 U.S.C. §1983, against Respondents in their official and individual capacities, claiming deprivation of rights under the Equal Protection and Due Process Clauses. The basis for federal jurisdiction was 28 U.S.C. §1343(3) and (4) and 28 U.S.C. §2201.

Respondents' Answer did not assert a qualified immunity defense. During the 90-day discovery period, fixed by the court without objection from Respondents, all Respondents voluntarily submitted to oral depositions. On August 25, 1986, and after discovery had been completed, Respondents alleged, by Amended Answer, Appendix, p.41a, infra:

> Some of the Defendants, as executive officials of the State, are immune from personal liability.

Based upon this allegation, and without attempting to set out the state of the law governing the conduct of which Poe complained, and relying solely on the seminal cases creating the defense, concluding with *Harlow v Fitzgerald,* 457 U.S. 800 (1982), Respondents filed a Rule 56 motion based on qualified immunity, combined with a Rule 56 motion on the merits. Poe's challenge to the sufficiency of the Amended Answer did not evoke a motion to further amend.

On January 14, 1987, Respondents' combined Rule 56 motions were denied and trial was set for April 20, 1987. Appendix, p.37a, infra. Respondents' motion to reconsider their Rule 56 motions was denied by order of March 12, 1987. Appendix, p. 39a, infra. The trial date was continued pending resolution of Respondents' interlocutory appeal.

On appeal, the court below vacated the trial court's order because reasons for the order had not been articulated. The legal question presented by the interlocutory appeal was not decided, but was remanded, with directions. On remand, Poe's individual capacity claims against Respondents were to be dismissed, unless she could establish *by direct evidence* before trial, during reopened discovery, that Respondents were discriminatorily motivated.

Poe's contentions concerning waiver of the privileges of qualified immunity, the insufficiency of Respondents pleadings, and the failure of Respondents to bear the burden of showing entitlement to the

defense, were rejected by the court below. The court below further ruled that Poe could not prevail against Respondents, individually, unless she pled and proved before trial that they actively participated in or authorized Henderson's harassment of her.

REASONS FOR GRANTING THE WRIT

Summary of Reasons

This case presents important questions bearing on the qualified immunity defense in §1983 actions: because intentional discriminatory motive is an essential element of a §1983 claim based on the denial of Equal Protection because of sex, should that subjective "state of mind" issue be addressed on the Rule 56 qualified immunity motion, or does it present a genuine issue of material fact on the Rule 56 motion going to the merits,[1] requiring a trial; may the defense of qualified immunity be waived, in whole or in part, by the inattention of the §1983 defendant in pleading or otherwise preserving it; which Party must shoulder the burden of prevailing when qualified immunity is raised; what is the quality of the evidence required, if it is the §1983 plaintiff who must present factual evidence of discriminatory motive to defeat a Rule 56 qualified immunity motion; and, must there be actual participa-

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[1]See the substantial distinction between this case and *Anderson* v. *Creighton*, 483 U.S. __ (1987) set out below at page 10.

tion or authorization by the superiors of a supervisor's sexual harassment of a subordinate, before the superiors are answerable, individually, in §1983 damages. These important questions should be addressed by this court.

1. In a public employee's §1983 action for acts of employment-related sex discrimination, where only the motive for the specific acts for which Defendants claimed qualified immunity was disputed, is the factual issue of whether that conduct was the result of intentional gender-based discrimination a matter for resolution on Defendants' 56 qualified immunity motion, or is it a matter for trial?

From *Monroe* v. *Pape,* 365 U.S. 167 (1961), through *Daniels* v. *Williams,* 474 U.S. 327 (1986), which removed simple negligence from the realm of §1983 actions, to *Anderson* v. *Creighton,* 483 U.S. __, 97 L.Ed. 2d 523, 107 S.Ct. 3034 (1987), with its "objective legal reasonableness" standard in 4th Amendment cases, the law has been settled that the subjective intent of the §1983 defendant when depriving a person of a federal right is not an element of a §1983 claim. The sole exception to this settled rule is the §1983 claim based on a deprivation of Equal Protection. In such a case, the §1983 plaintiff must prove discriminatory intent to establish the §1983 claim. *Personnel Administrator of Mass.* v. *Feeney,* 442 U.S. 256 (1979).

The *Harlow* rule removes the subjective state of mind of the §1983 defendant from the question of the

defendant's entitlement to qualified immunity. However, because the subjective state of mind of the §1983 defendant is an essential element of sex discrimination claims based on the Equal Protection Clause, it does not implicate the artful, state-of-mind allegation requiring a trial, which *Harlow*'s objective test was designed to defeat.

This case is distinguishable from *Anderson* v. *Creighton*. There, the question of a searching officer's qualified immunity turned on whether, in light of the information possessed by him, it could have been *objectively* concluded that the search was legally reasonable. Here, the question of whether Respondents were motivated by gender-based animus turns on the *subjective* state of mind of Respondents. This latter question presents a factual matter, essential to Poe's claims on the merits and is unsusceptible to resolution on a Rule 56 motion.

In conflict with the 6th Circuit, the 9th Circuit in *Gutierrez* v. *Mun.Ct. of S.E. Judicial Dist.*, 838 F.2d 1031, 1051 (9th Cir., 1988), joined the 8th Circuit in *Goodwin* v. *Circuit Court of St Louis County, Mo.*, 729 F.2d 541 (8th Cir., 1984), *cert. denied*, 469 U.S. 1216 (1985) in holding that qualified immunity is not a defense in cases involving intentional discrimination. *Gutierrez*, at 1053, concluded:

> Discriminatory intent is an essential element of a 1983 action where the underlying claim is a violation of the equal protection clause. Qualified immunity is not a defense in such cases.

This court ought to grant this Petition to decide whether discriminatory motive in a §1983 action founded on the Equal Protection Clause is an element which the Plaintiff must establish to overcome a Rule 56 qualified immunity motion after discovery, or whether discriminatory motive or intent is an element of a Rule 56 motion on the merits and when in dispute, as here, can be resolved only by a trial on the merits.

2. Where a Rule 56 qualified immunity motion is made after full discovery had occurred, must the §1983 plaintiff show that the §1983 defendant is not entitled to the defense, or must the §1983 defendant show that he is?

The court below, by vacating the order denying the qualified immunity defense, raised an important question which this court ought to resolve, i.e., if that affirmative defense is raised, must the plaintiff defeat it, or must the defendant establish it?

Harlow placed the burden on the §1983 defendant to establish entitlement to the qualified immunity defense, holding at 819, that "if the official pleading the defense . . . can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained."

Davis v. *Scherer,* 468 U.S. 183 (1984), placed the burden on the §1983 plaintiff to establish the absence of the defense, holding at 197, that "(a) plaintiff . . . may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue."

The 6th Circuit, in *Alexander* v. *Alexander,* 706 F.2d 751 (6th Cir., 1983), followed *Harlow* and placed the burden on the §1983 defendant. Creating a conflict within the circuit, the court below followed *Scherer,* placing the burden on the §1983 plaintiff. In *Dominque* v. *Telb,* 831 F.2d 673 (6th Cir., 1987), the 6th Circuit held that the burden should not be placed entirely on the defendant at the stage when the sufficiency of the complaint was tested in light of qualified immunity, and required the plaintiff to plead facts which, if true, describe the violation of a clearly established right. (Respondents neglected to raise the defense at that stage.)

The 8th Circuit in *Hobson* v. *Wilson,* 737 F.2d 1, 25 (D.C. Cir., 1984) cert. denied sub nom. *Brennan* v. *Hobson,* 470 U.S. 1084 (1985), followed *Harlow* requiring the defendant to show that he neither knew nor should have known of the relevant legal standard. The 4th Circuit in *Turner* v. *Dammon,* 848 F.2d 440, 445 (4th Cir., 1988) placed the burden on the defendants, affirming a denial of the defense because the defendants offered "no basis from which any reviewing authority can gauge the reasonableness of their actions."

This Court ought to grant this Petition to give guidance to trial courts when deciding the availability of the affirmative defense of qualified immunity and resolve the conflict within the 6th Circuit and the conflict between the opinion below and the 8th and 4th Circuits.

3. Does the answer of eleven (11) §1983 Defendants, amended after full discovery had occurred to allege that "(s)ome of the Defendants, as executive officials of the State, are immune from personal liability," sufficiently assert immunity from personal liability for all Defendants, and the privilege of qualified immunity against subjecting Defendants to trial?

Pleading that "some of the Defendants" are immune from personal liability carries with it the admission that "some" are not. At footnote 3, Appendix, p. 12a, infra, the court below rejected Poe's argument that by pleading that "some" of the Defendants "are immune from personal liability," Respondents failed to plead qualified immunity with respect to any particular Defendant, and therefore had the effect of pleading the defense as to *none* of them. The various acts of which Poe complained differ, depending upon which Respondent's conduct is being challenged, although some of Respondents' acts were jointly committed. Although Respondents argued at the trial court that the acts of individual Respondents were not discriminatory, the defense of qualified immunity was sought by all Respondents (except Henderson), as a group, without particularizing the specific act(s) of each.

Alexander, supra, held that a §1983 defendant has the burden of pleading (and proving) the qualified immunity affirmative defense. The opinion below conflicts with *Alexander,* as well as *Gomez* v. *Toledo,* 446 U.S.

635 (1980), a pre-*Harlow* decision, a holding which *Alexander* followed, and a holding which was unaffected by *Harlow*. Under Rule 8(c) any "matter constituting an avoidance or affirmative defense" shall be set forth affirmatively.

It is not hypertechnical to point out that Respondents pled but one of the three (3) elements of qualified immunity, i.e., immunity from personal liability. Freedom from the burdens of discovery (to which they had freely submitted), and freedom from subjection to trial, were not pleaded.

Poe's contention that Respondents' pleading as to "some" of them does not "exalt form over substance," in light of *Harlow*'s recognition, at 807, that *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) "acknowledged that high officials require greater protection than those with less complex discretionary responsibilities."

The Petition ought to be granted to resolve the question of what a §1983 defendant must plead in order to adequately assert the affirmative defense of qualified immunity so as to achieve the full benefits of that defense, including freedom from subjection to trial.

4. Where individual §1983 Defendants had not challenged the sufficiency of the complaint in the light of qualified immunity, and their purported plea of qualified immunity was not made until after all Defendants had voluntarily submitted to depositions, and the discovery deadline had passed, was their a waiver of the defense, and its privilege against subjection to trial?

Mitchell v. *Forsyth,* 472 U.S. 511 (1985) holds, at 526, that "(t)he entitlement (of qualified immunity) is an *immunity from suit* rather than a mere defense to liability" (Parenthetical supplied; emphasis, the Court's).

Citing *Mitchell,* at footnote 3, Appendix, p.12a, infra, the court below rejected Poe's contention that Respondents waived qualified immunity by failing to seek a resolution of that issue before discovery. Therefore, the opinion below conflicts with *Kennedy* v. *City of Cleveland,* 797 F.2d 297 (6th Cir., 1986), holding, at 300, that the rights of qualified immunity, i.e., freedom from the burdens of discovery, subjection to trial or ultimate liability, can be lost by failure to timely assert the defense. Because no discovery had occurred in *Anderson* v. *Creighton,* the case was remanded for limited discovery on the facts confronting the officer when the search was undertaken. Here, all discovery was completed with no eye toward qualified immunity because Respondents did not purport to plead it until after the deadline for discovery had passed. *Mitchell*

can be easily read to support the conclusion that waiver of the privileges of qualified immunity is a waiver of the defense.

This Petition should be granted to decide to what extent, if any, the qualified immunity defense may be waived by unexcusable delay in raising it, including whether such waiver, if any, applies to Respondents' ultimate personal liability, freedom from subjection to trial, or both.

5. Must a §1983 Plaintiff, claiming deprivation of Equal Protection because of public employment sex discrimination, present direct evidence of discriminatory intent to defeat a Rule 56 qualified immunity motion?

The court below relied on *Martin* v. *D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1435 (D.C. Cir., 1987), to hold at Appendix, p.34a, infra, that inferential or circumstantial evidence would be insufficient, and that direct evidence of gender-based animus must be provided by Poe to survive Respondents' Rule 56 qualified immunity motion. Although, such reliance was misplaced because *Martin* concerned the subjective state of mind question, as an element of conspiracy, rather than as an element of a claimed deprivation of Equal Protection, the 6th Circuit stands alone in requiring direct evidence to establish discriminatory motive on equal protection claims.

Title VII claims do not differ from §1983 claims relying on the Equal Protection Clause because both

require evidence of discriminatory motive. This Court in *Watson* v. *Fort Worth Bank and Trust,* 487 U.S. __, 101 L.Ed.2d 827, 108 S.Ct. __ (1988) extended for use in cases where subjective employment practices allegedly had a disparate impact, the previously approved use of statistical (circumstantial) evidence in cases where allegedly objective employment practices had a disparate impact, which, in operation were "functionally equivalent to intentional discrimination."

Recognizing that subjective discriminatory motive is rarely provable by direct evidence, courts have long permitted circumstantial or inferential evidence to establish it. This Court ought to grant this Petition to remove the 6th Circuit from its now isolated position, and re-authorize §1983 plaintiffs in that circuit to establish subjective discriminatory motive by less than direct evidence.

6. Where a §1983 plaintiff claimed that some of her superiors "acquiesced in, condoned and ratified" public employment-related sexual harassment by taking adverse employment action against her after she complained of sexual harassment by her immediate supervisor, do the offending superiors escape personal liability, if the Plaintiff cannot show that those superiors actively participated in or authorized the specific incidents of harassment of which she complained?

Poe's claim against Respondents is premised upon their unconstitutional policy of tolerating sexual

harassment of female employees. See, *Pembaur* v. *City of Cincinnati,* 475 U.S. 469 (1986) holding that §1983 plaintiffs need not show that the policy complained of predated the conduct complained of. This policy was advanced by Respondents when they engaged in a "whitewash" and took adverse employment action against her when she complained about the harassment.

Relying on two 6th Circuit cases (Appendix, p.26a, infra) neither of which implicated sex discrimination, the court below established for the 6th Circuit a rule that only supervisors who encourage or directly participate in sexual harassment may be answerable for equal protection deprivations in this context under §1983.

This Court ought to grant this Petition to decide that supervisors who pursue a policy of tolerating sexual harassment in public employment by a "whitewash" of the offending employee's conduct, and by taking punitive employment action against the victim of harassment who complained about it, are answerable personally in damages in a §1983 action, premised on the deprivation of equal protection of the laws.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to the U.S. Court of Appeals for the Sixth Circuit to review its judgment vacating, and remanding with directions, the trial court's order denying the defense of qualified immunity to the Respondents.

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-5377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATSY CAROLYN POE, *Plaintiff-Appellee,*

v.

DONNIE HAYDON, et al., *Defendants-Appellants.*

ON APPEAL from the United States District Court
for the Eastern District of Kentucky

Decided and Filed July 28, 1988

Before: LIVELY, JONES, and BOGGS, Circuit Judges.

BOGGS, Circuit Judge, delivered the opinion of the court in which LIVELY, Circuit Judge, joined. JONES, Circuit Judge, (p. 29) delivered a separate opinion concurring in the result only.

BOGGS, Circuit Judge. In this civil rights suit under 42 U.S.C. § 1983, various Kentucky state officials appeal the district court's order denying their motion for summary judgment based on qualified immunity. Because the district court did not properly address the issue of qualified immunity, we vacate the denial of

summary judgment and remand for further proceedings.

I

We begin with a brief overview of the facts. Patsy C. Poe was employed as a janitor by the Finance and Administration Cabinet of the Commonwealth of Kentucky. In July 1984, she began working on the night shift at the Capitol Building under the supervision of J.L. Henderson, the night foreman.[1]

In December 1984, Poe asked her superior, appellant Donnie Haydon, Building Superintendent of the Capitol, for a day shift position in the Capitol. Haydon denied the request because there were no openings on the day shift, and the Governor required the bulk of the cleaning to take place on the night shift. Haydon asked Poe whether anyone was giving her a problem of any kind, and she responded that someone was bothering her on the night shift. Poe refused to give his name, however, and indicated she would work out the problem herself. Haydon offered his assistance in the event she could not handle the problem.

On December 10, 1984, Poe wrote a letter to Haydon's supervisor, appellant Robert Smither, Branch Manager of the Division of Physical Plant, accusing Henderson of physical and sexual harassment. Copies of the letter were sent to many of

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[1]Henderson is not a party to this appeal.

the appellants, including Smither's superior, appellant John Spicer, Director of Physical Plant. In her letter, Poe detailed incidents of harassment and requested the situation be changed. She indicated that she did not want to be transferred out of the Capitol, but simply wanted "to be left alone so I can do my job without being harassed by anyone."

Before Poe's next work shift, Spicer conducted a meeting with Henderson, Haydon and Smither to determine the facts. Henderson denied the allegations, but he was warned that sexual harassment would not be tolerated. After learning of Poe's request for a day shift position, Spicer instructed Smither to offer her the day shift in the New Capitol Annex Building (Capitol Annex), where there was an opening. Alternatively, Poe should be assigned two janitors to accompany her while she worked to prevent her from being alone at any given time.

That same day, Smither and Haydon met with Poe and her husband. Poe again asked to be moved to the day shift in the Capitol, but she was again advised there were no openings. After the meeting, she remained in her present position and was assigned to work with two other janitors to protect her from future harassment. Poe admitted that these two janitors were her friends and she felt safe with them. Nevertheless, she indicated the new arrangement was unworkable. As Poe explained in her deposition testimony, "[W]hen we go in to clean an office, we all had to go together

and three people in one small office, there is no way it can be done . . . [b]ecause you are running over top of each other. If one had to go out to get supplies, we had to quit working and come out and stand in the hallway until the other one come back."

Appellant Ventra Hammond, Director of the Office of Equal Employment Opportunity, initiated her own investigation at the request of Gordon Duke, Secretary of the Finance and Administration Cabinet. Hammond met with Poe and Henderon separately. Based on these interviews, and Spicer's letter which described Poe's meeting with Smither and Haydon, Hammond prepared a December 20, 1984, memorandum to Duke detailing her findings. She concluded that it was "one person's word against the other's," but a further meeting should be held to discuss Poe's allegation of "possible management favoritism."

In addition to her interviews, Hammond asked Spicer to investigate Poe's allegations further. He, in turn, asked Haydon to obtain statements from Poe's witnesses, including fellow janitors Douglas Eversole and Elizabeth Perkins, and security guard Bessie Tracy. These witnesses confirmed Poe's allegations in various respects. Hammond received these statements after preparing her December 20 memorandum, but she did not believe they warranted revising the document.

According to Poe, Henderson did not cause any problems following the December 10 meeting. How-

ever, Poe informed Haydon by letter dated December 20 that she would be taking a leave of absence, "[d]ue to the sexual harassment, nervous condition and pressure of the matter concerning J.L. Henderson."

Appellant James Stewart, Director, Office of Management Services, first became aware of Poe's allegations when Spicer contacted him about Poe's leave of absence. He reviewed Hammond's files and informed Poe by letter dated February 20, 1985, that insufficient grounds existed for any disciplinary action against Henderson. After reiterating that a day shift position in the Capitol was unavailable, Stewart offered Poe several options: 1) return to work on the night shift in the Capitol; 2) accept a transfer to the Capitol Annex, which Stewart understood Poe had been offered earlier; 3) request leave without pay for medical reasons, if her health precluded her from working further; or 4) resign her position by submitting a letter of resignation.

By letter dated February 25, Poe denied that she was ever offered a job in the Capitol Annex, and believed that such a change would result in a cut in pay. Poe asked to return to her previous position on the night shift in the Capitol, but she wanted to be treated "as an equal employee" without anyone assigned to her as protection.

Stewart met with Poe, her attorney and several other employees on March 1, 1985. Poe again requested the day shift position in the Capitol. Since the day shift was unavailable, a position in the Capitol Annex was

offered to her. Refusing this offer, Poe decided instead to return to the night shift in the Capitol, which she did that same day.

On March 28, 1985, Poe filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC) against the Finance and Administration Cabinet, in which she stated: "No reason has been given as to why I am constantly being harassed by Mr. Henderson. Also, no action has been taken against him." After learning of this statement, Smither, on the recommendation of Haydon, informed Poe by letter dated May 8, 1985, that she would be reassigned to the Capitol Annex on the night shift. She was later permitted to transfer to the day shift in that building.

On May 13, 1985, appellant Tony Miller, Commissioner of the Department of Facilities and Management, became involved when Poe and her husband came to his office complaining about Henderson's past harassment. Poe argued that it was unfair to move her to the Capitol Annex because of the EEOC charge. She brought with her EEOC affidavits containing witnesses' sworn statements regarding Henderson's alleged harassment. Although Miller thought the problem had been resolved earlier, he decided to contact appellant Lowell Clark, Stewart's successor as Director, Office of Management Services. At Miller's request, Clark interviewed three of Poe's witnesses (Perkins, Miller and Eversole) to verify their affidavits.

On May 17, 1985, Clark informed Miller of his conclusions. Clark concluded that there was still no

proof of Poe's allegations. He also saw no reason to question Hammond's earlier investigation. When Clark learned that Poe had written a letter to the Attorney General about Henderson on May 10, 1985, which he interpreted as "stating that a problem is continuing to exist," he consulted with counsel for the Finance and Administration Cabinet. Counsel advised Clark that it was best to keep Poe and Henderson separated while the EEOC charge was being investigated. Clark thus determined that no change in Poe's asssignment (sic) should be made. Upon receiving Clark's letter, Miller's office wrote to Poe on May 17 informing her that "it would be best if you remained in your present work assignment until the federal EEOC complaint is resolved."

On May 31, 1985, Poe filed a charge of retaliation with the EEOC, alleging her transfer to the Capitol Annex was in retaliation for her previous sex discrimination charge against the Finance and Administration Cabinet. She later abandoned her Title VII charges to pursue claims under 42 U.S.C. § 1983.

On December 3, 1985, Poe filed the instant action against Henderson and the appellants, alleging violations of the equal protection clause and the due process clause of the fourteenth amendment. In her complaint, she argued principally that the appellants were aware of the hostile and abusive work environment caused by Henderson's sexual harassment, but failed to take immediate action to correct the situation, including an adequate investigation of the matter. The appellants

thus "acquiesced in, condoned and ratified the conduct of Henderson in creating Poe's employment-related, sexually harrassing [sic] environment." She also alleged that appellants reassigned her to the Capitol Annex in retaliation for her filing a charge of sex discrimination with the EEOC. Poe sought compensatory and punitive damages against each appellant, and injunctive relief, which included restoration of sick leave and vacation time, and reinstatement to her previous position in the Capitol.

The parties initiated discovery and Poe deposed the appellants. The appellants then moved for summary judgment on the merits and on the basis of qualified immunity. The district court denied the motion in a brief order. On March 12, 1987, the court denied the appellants' motion to reconsider, ruling that the appellants "may have violated the plaintiff's clearly established rights and hence are not qualifiedly immune." This interlocutory appeal followed.

II

Government officials performing discretionary functions are afforded qualified immunity, shielding them from civil damages, as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, whether an official "may be held personally liable for an allegedly unlawful official action generally turns

on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson* v. *Creighton,* __ U.S. __, __, 107 S.Ct. 3034, 3038 (1987) (citations omitted).

Qualified immunity accommodates two important competing interests. On the one hand, an action for damages may be "the only realistic avenue for vindication of constitutional guarantees" where officials violate the public trust. *Harlow,* 457 U.S. at 814. Yet, the "threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties." *Forrester* v. *White,* __ U.S. __, __, 108 S.Ct. 538, 542 (1988) (emphasis in original).

> When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.

Id. at __, 108 S.Ct. at 542. *See also Anderson,* __ U.S. at __, 107 S.Ct. at 3038 ("[P]ermitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.");

Harlow, 457 U.S. at 814 ("These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."). Thus, government officials must be given some assurance that they can perform their duties without fear of monetary liability or the diversions inherent in litigation. The doctrine of qualified immunity seeks to achieve this salutary goal. The doctrine reflects the belief "that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis* v. *Scherer,* 468 U.S. 183, 195 (1984).

In *Anderson* v. *Creighton,* U.S. __, 107 S.Ct. 3034 (1987), the Supreme Court elaborated on the level of generality at which legal rights are "clearly established." The Court pointed out that it would be improper to look at the legal right in the abstract in determining whether the law was clearly established at the time of the defendant's alleged violation.

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected unless the very action in question has previously been held unlawful, but it is to say that

> in the light of preexisting law the unlawfulness must be apparent.

Id. at __, 107 S.Ct. at 3039 (citations omitted). The relevant inquiry focuses on whether a reasonable official in the defendant's position could have believed his conduct to be lawful, considering the state of the law as it existed when the defendant took his challenged actions. *See id.* at __, 107 S.Ct. at 3039-40.

In determining whether the law was clearly established, we look to "federal constitutional, statutory or case law existing at the time." *Dominique* v. *Telb,* 831 F.2d 673, 677 (6th Cir. 1987). When the focus is on decisional law, we examine initially, and most importantly, the decisions of the Supreme Court and the courts of this circuit. *Garvie* v. *Jackson,* 845 F.2d 647, 649 (6th Cir. 1988); *Davis* v. *Holly,* 835 F.2d 1175, 1180 (6th Cir. 1987).[2] If case law from these sources is unavailable, we may also look for guidance to the cases from other circuits.

Resolution of qualified immunity is purely a question of law for the district court. *Dominique,* 831 F.2d at 677. Although "both parties have a great interest in ascertaining and in presenting their views concerning what the clearly established law was at [the relevant] time," the trial judge "bears the ultimate responsibility to resolve the question." *Ibid.*

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[2]We may also look to the decisions of the highest state court in the state where the case arose. *Robinson* v. *Bibb,* 840 F.2d 349, 352 (6th Cir. 1988).

III

At the outset, we set forth the parties' respective procedural and evidentiary burdens on the qualified immunity issue. Poe contends that the burden is on the defendants to establish that they are entitled to qualified immunity; the plaintiff has no burden whatsoever of showing that the rights at issue were "clearly established" at the time of the alleged violation.[3] By contrast, appellants argue that Poe has the burden of proving that their conduct violated clearly established statutory or constitutional law of which a reasonable official would have known.

In *Mitchell* v. *Forsyth,* 472 U.S. 511 (1985), the Supreme Court made clear that qualified immunity is not simply a defense to liability on the merits, but is in fact "an entitlement not to stand trial or face the

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[3]Additionally, Poe argues that appellants have waived qualified immunity by failing to identify by name in their amended answer which defendants were asserting the defense. We disagree. The amended answer stated that "[s]ome of the Defendants, as executive officials of the State, are immune from personal liability." The amended answer provided Poe and the district court with sufficient notice of the appellants' claim to qualified immunity. She has not cited case authority, nor offered any compelling reason, why we should conclude that "[t]he failure to plead the defense with respect to any particular Defendant has the effect of pleading the defense with respect to *none* of the Defendants, thereby waiving it as to all." This would exalt form over substance.

We also reject Poe's contention that appellants have waived qualified immunity by failing to seek court resolution of that issue before discovery. *See Mitchell* v. *Forsyth,* 472 U.S. 511 (1985).

other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Id.* at 526. "The entitlement is an *immunity from suit* rather than a mere defense to liability." *Ibid.* (emphasis in original). Since qualified immunity "is effectively lost if a case is erroneously permitted to go to trial," the Court pointed out, the doctrine has been forumlated in such a way as to allow insubstantial claims to be dismissed early in the litigation, such as by summary judgment, thereby protecting officials from the costs of trial and the burdens of litigation. *Id.* at 526-27.

Since qualified immunity is an affirmative defense which must be pleaded by the defendant official, *Harlow,* 457 U.S. at 815, a civil rights plaintiff need not anticipate the defense in the complaint. We have held, however, that a plaintiff seeking damages against a government official in his individual capacity for an act committed under color of law should "normally include in his original complaint all of the factual allegations necessary to sustain a conclusion that defendant violated clearly established law." *Dominique* v. *Telb,* 831 F.2d 673, 676 (6th Cir. 1987).

> If he does not, however, and if a qualified immunity challenge is made to the complaint, then . . . the court must accord the plaintiff an opportunity to come forward with such additional facts or allegations that show not only violations of his constitutional rights, but also that these rights were so

> clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.

Ibid. (citation omitted). The plaintiff's failure to plead such facts or allegations prevents the case from moving forward, even from proceeding to discovery, "since the plaintiff has failed to allege acts that are outside the scope of the defendant's immunity " *Kennedy* v. *City of Cleveland,* 797 F.2d 297, 299 (6th Cir. 1986) (citation and footnote omitted), *cert. denied sub nom. Hanton* v. *Kennedy,* __ U.S. __, 107 S.Ct 1334 (1987). *Accord, Anderson* v. *Creighton,* __ U.S. __, __ n. 6, 107 S.Ct. 3034, 3042 n. 6 (1987).

As noted, a public official may assert qualified immunity as an affirmative defense, but the point may also be put at issue before a formal defense is ever asserted. Thus, "the defendant could properly challenge the sufficiency of the complaint under F.R.C.P. 12(b)(6) on the basis that he was entitled to qualified immunity because the facts pleaded would not show that his conduct violated clearly established law of which a reasonable person should have known at the time." *Dominique,* 831 F.2d at 677 Whether qualified immunity is raised in a motion to dismiss or as an affirmative defense, the official must plead facts which, if true, would establish that he was acting within the scope of his discretionary authority when the challenged conduct occurred. *Davis* v *Holly,* 835 F.2d 1175,

1178 (6th Cir. 1987). *See Harlow,* 457 U.S. at 816 "Immunity generally is available only to officials performing discretionary functions.").

If the defendant's qualified immunity cannot be resolved on the pleadings, "then presumably the district court can so hold, and the matter may then either be appealed or proceed on to the discovery stage, after which it might be possible to resolve the issue by appropriate motion for summary judgment." *Dominique,* 831 F.2d at 677 (citing *Anderson,* __ U.S. at __ n. 6, 107 S.Ct. at 3042-43 n. 6). When the defendant takes and interlocutory appeal, all discovery must cease. *Kennedy,* 797 F.2d at 676. If the case proceeds to discovery, "any such discovery should be tailored specifically to the question of [the defendant's] qualified immunity." *Anderson,* __ U.S. at __ n. 6, 107 S.Ct. at 3042 n. 6. Thereafter, the defendant may "file a motion for summary judgment so that the further harassment of going to trial may be avoided." *Kennedy,* 797 F.2d at 299.

When a party moves for summary judgment, the district court must determine, as before, whether the contours of the right that the government official allegedly violated was "sufficiently clear that a reasonable official would have understood that what he is doing violates that right." *Anderson,* __ U.S. at __, 107 S.Ct. at 3039. Since this inquiry will turn on the circumstances with which the official is confronted, and often on the information that he possesses, the district court must consider all the undisputed evidence

produced as a result of discovery, read in the light most favorable to the non-moving party. *Green* v. *Carlson,* 826 F.2d 647, 650-52 (7th Cir. 1987).

If the undisputed facts show that defendant's conduct as a matter of law, did not violate clearly established legal rights, then the district court must grant the defendant summary judgment on the basis of qualified immunity. *Id.* at 652. Thus, for example, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to the truth of the allegations that the defendant in fact committed acts that violate clearly established law. *Mitchell* v. *Forsyth,* 472 U.S. at 526.

On the other hand, summary judgment would not be appropriate if there is a factual dispute (*i.e.,* a genuine issue of material fact) involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights. *Green,* 826 F.2d at 652. Summary judgment also should be denied if the undisputed facts show that the defendant's conduct did indeed violate clearly established rights. *Ibid.* In either event, the case will then proceed to trial, unless the defendant takes a successful interlocutory appeal on the issue of qualified immunity. *Kennedy,* 797 F.2d at 299-300.

Regardless of the stage at which the issue of qualified immunity is addressed, the district court should indicate the clearly established right at issue and the

factual basis for its conclusion that a genuine issue exists as to the commission of acts violating that right. *Dominique,* 831 F.2d at 677.

IV

In rejecting the appellants' claim to qualified immunity, the district court concluded that the appellants "may have violated the plaintiff's clearly established rights and hence are not qualifiedly immune." In its brief order, the trial court did not articulate its reasons for reaching this conclusion, although we may discern its analysis from the hearing conducted on this matter. Apparently, the district court concluded that Poe had a clearly established right under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and perhaps under the equal protection clause of the fourteenth amendment, to be free from a hostile work environment created by sexual harassment. The lower court denied summary judgment because there was a disputed issue as to whether appellants, in responding to Poe's reports of sexual harassment and to her filing of the EEOC complaint, were motivated by an intent to discriminate.[4]

The district court's ruling is deficient in two fundamental respects. First, and foremost, the district court failed to address the issue of qualified immunity with

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[4]We will discuss the relevance of a defendant's intent or motive in the qualified immunity analysis in Section VI, *infra.*

reference to the undisputed facts in the record produced by discovery. Although the court had before it the appellants' deposition testimony, the hearing below reveals that the lower court did not read this evidence before ruling on the motion for summary judgment. By limiting its inquiry to the pleadings, the district court's analysis was not faithful to *Anderson*, __ U.S. at __, 107 S.Ct. at 3039.

Second, the court neglected to state more fully the basis for its conclusions. "The minute order disposing of the issue gives us little help in our review." *Whitt* v. *Smith*, 832 F.2d 451, 454 (7th Cir. 1987). We recognize that Rule 52(a), Fed. R. Civ. P., provides that findings of fact and conclusions of law are unnecessary when the district court grants or denies a motion for summary judgment. Because interlocutory review is available for the denial of such motions based on qualified immunity, however, we believe it is better practice for the district court to set forth with precision the basis for its decision. *Dominique*, 831 F.2d at 677. This will facilitate intelligent appellate review, and we believe it will conserve scarce judicial resources in the long run.

Although this court could conduct its own examination of the record and determine if there is a genuine dispute about any fact material to whether appellants violated any clearly established constitutional or statutory rights, we decline to do so. As we discuss *infra*, Section VI, the qualified immunity analysis in

this case will turn in large measure on the appellants' motivations. This particular issue has not been properly addressed by the district court, nor has it been adequately briefed by the parties in this appeal. We suspect the same was true in the district court. Instead, we remand this case for a determination as to whether, based on all the undisputed evidence before the court, a reasonable official in the position of each appellant could have believed his or her conduct to be lawful, considering the state of the law as it existed when he or she took the challenged actions.[5]

V

In order to assist the lower court on remand, we will examine the state of the law as it existed at the time the appellants allegedly engaged in improper conduct. The starting point for our analysis is Poe's claims against the appellants, which she has summarized as follows:

> Defendants knew from Henderson's prior conduct that Henderson had created a sexually harassing working environment, but took no corrective action; that Poe suffered the final sexual assault by Henderson when such Defendants had that knowledge, but that (without regard to whether or not they had such prior knowledge) Defendants acquiesced in and condoned Henderson's conduct

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[5]Each government official must be judged on the basis of his or her own conduct, intent and position in the state hierarchy.

> by taking adverse, punitive employment action against her, by changing the conditions of her employment, i.e., causing two male coworkers to accompany her at all times; that when Poe's EEOC complaint was served on Defendants, adverse employment action was, again, taken against her by transferring her to a less desirable work-place (whether this was in retaliation for filing the EEOC complaint, or as condoning Henderson's sexually harassing conduct, the transfer violated clearly established federal statutory and constitutional law).
>
> . . . .
>
> It is upon the sex-based discrimination by Appellants in tolerating Henderson's sexual harassment of Poe, by taking adverse employment action against her rather than Henderson, that her Fourteenth Amendment claims are based.

On the basis of the foregoing summary and Poe's complaint we will endeavor to discern the precise legal rights which she contends were violated.

A

Poe argues that the appellants failed to conduct an adequate investigation of her allegations of sexual harassment. Her argument assumes that, had appellants "adequately" investigated her complaint, her allegations of sexual harassment would have been conclusively proven; appellants would then have been constitutionally required to take disciplinary action against Henderson or to move Poe to the day shift in the

Capitol. At oral argument, Poe retreated from this position, indicating that she was not seeking damages from the appellants for their failure to discipline or fire Henderson. We agree with the appellants that, at the time of the alleged violation, Poe did not have a clearly established constitutional or statutory right to a specific outcome following an investigation of her complaint of sexual harassment. *See Davis* v. *Holly,* 835 F.2d 1175, 1180 (6th Cir. 1987). Poe has failed to bring to our attention any case law to support this contention, and we thus find it to be without merit.

This is not a case where supervisory officials refused to conduct any investigation at all. As soon as Poe alerted her superiors to possible sexual harassment, an investigation was initiated to determine the facts. Indeed, the record shows that no less than three separate investigations of Poe's complaint were initiated during the events in question; those of Spicer, Hammond and Clark. These investigations proved inconclusive, however, and appellants felt unable to discipline Henderson. They were also prevented from moving Poe to a day shift position in the Capitol because there were no openings, a reason totally divorced from the merits of the sexual harassment claim. Whether the results of the investigations were right or wrong is an open question, but "it is clear the [appellants] did not stand idly by once alerted to the possibility of a problem. . . . ." *Ibid.*

B

Next, Poe claims that the appellants were aware of the offensive and hostile work environment created by Henderson's sexual harassment, but failed to take corrective action. While not clearly articulated, we understand her claim to be based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* In essence, Poe contends that at the time of the challenged conduct, Title VII protected an employee from a hostile or abusive work environment resulting from sexual harassment. This argument has considerable force.

Title VII makes it unlawful for an "employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank, FSB* v. *Vinson,* 477 U.S. 57, __, 106 S.Ct. 2399, 2409 (1986), the Supreme Court ruled that "hostile environment" sexual harassment is a form of sex discrimination prohibited by Title VII. However, *Vinson* merely confirmed what had already been well established before December 1984 in many circuits, *Simmons* v. *Lyons,* 746 F.2d 265, 270 (5th Cir. 1984); *Katz* v. *Dole,* 709 F.2d 251, 254 (4th Cir. 1983); *Henson* v. *City of Dundee,* 682 F.2d 897 (11th Cir. 1982); *Bundy* v. *Jackson,* 641 F.2d 934 (D.C. Cir. 1981); *Tomkins* v. *Public Service Electric & Gas Co.,* 568 F.2d 1044, 1048-49 (3d Cir. 1977), as well as in the district courts of the Sixth Circuit. *See, e.g., Rabidue* v. *Osceola Refining*

Co., 584 F.Supp. 419, 427-33 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, __ U.S. __, 107 S.Ct. 1983 (1987); *Coley* v. *Consolidated Rail Corp.*, 561 F.Supp. 645, 646 (E.D. Mich. 1982) (and cases cited therein). Indeed, the EEOC as early as 1980 issued guidelines specifying that sexual harassment was a form of sex discrimination prohibited by Title VII. 29 C.F.R. § 1604.11(a). *See Vinson*, 477 U.S. at 65, 106 S.Ct. at 2405.

Further, the law was clearly established that an employer may be held liable under Title VII for "hostile environment" sexual harassment, whether the offender was a fellow employee, *Henson*, 682 F.2d at 905 & n. 9; *Bundy*, 641 F.2d at 947; *Rabidue*, 584 F.Supp. at 431 & n. 47; *Coley*, 561 F.Supp. at 650; 29 C.F.R. § 1604.11(d), or a supervisory employee (*i.e.*, the agent of the employer), *Craig* v. *Y&Y Snacks, Inc.*, 721 F.2d 77, 80-81 (3d Cir. 1983); *Bundy*, 641 F.2d at 943, 947; *Miller* v. *Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979); 29 C.F.R. § 1604.11(c).

Despite the force of Poe's legal argument, her contention based on Title VII must fail. In *Davis* v. *Scherer*, 468 U.S. 183 (1984), the Supreme Court ruled that "[n]either federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon." *Id.* at 194 n. 12. This is the case where the statute itself authorizes a cause of action for damages,

see, e.g., Harlow, 457 U.S. at 820 n. 36, or where the statute provides a basis for an action brought under 42 U.S.C. § 1983, *see, e.g., Maine* v. *Thiboutot,* 448 U.S. 1 (1980).

In the instant case, Poe proceeded solely under 42 U.S.C. § 1983. Title VII does not provide "the basis for the cause of action sued upon," *Davis,* 468 U.S. at 194 n. 12, because 1) Poe abandoned her Title VII claims to pursue her claims under § 1983; and 2) Title VII does not provide the basis for an action brought under § 1983. *Day* v. *Wayne County Board of Auditors,* 749 F.2d 1199, 1204 (6th Cir. 1984) Thus, the mere fact that Poe's Title VII rights to be free from "hostile environment" sexual harassment were clearly established at the time of the challenged conduct is not sufficient to defeat appellants' qualified immunity. *See Gagne* v. *City of Galveston,* 805 F.2d 558, 560 (5th Cir. 1986), *cert. denied sub nom. Gagne* v. *Putnal,* __ U.S. __, 107 S.Ct. 3266 (1987). Poe's claims then must rest on alleged violations of the Constitution.

C

Appellants have characterized Poe's chief constitutional claim as follows: 1) whether sexual harassment is a violation of the equal protection clause of the fourteenth amendment; and, if so, 2) whether supervisory officials can be held liable for sexual harassment committed by subordinates. Appellants argue that, at the time of the challenged conduct, sexual harassment was

not a violation of the equal protection clause of the fourteenth amendment and, moreover, supervisory officials could not be held liable for harassment committed by subordinates. Although we disagree with this assessment of the law, we conclude that Poe's § 1983 sexual harassment claims here must fail.

The case law before December 1984 established that sexual harassment by government employers would violate the rights protected by the equal protection clause. *Huebschen* v. *Department of Health and Social Services,* 716 F.2d 1167, 1172 (7th Cir. 1983) ("sexual harassment . . . directed solely at the plaintiff because she was a woman" violates the equal protection clause);[6] *Skadegaard* v. *Farrell,* 578 F.Supp. 1209, 1216-17 (D. N.J. 1984); *Woerner* v. *Brzeczek,* 519 F.Supp. 517, 519-20 (N.D. Ill. 1981). *See Scott* v. *City of Overland Park,* 595 F.Supp. 520, 529 (D. Kan. 1984). Two other district courts, including the United States

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[6]Appellants argue that *Huebschen* never specifically ruled that sexual harassment can be the basis of an action under the equal protection clause. While there is no explicit language to that effect, we believe the focus of the entire case is to the contrary. In *Huebschen* the Seventh Circuit ruled that sexual harassment does not violate the equal protection clause when the offensive conduct is not aimed at the plaintiff because of his or her gender. The court held that the female defendant harassed the male plaintiff not because the plaintiff was a man, but because the plaintiff was a former lover who had jilted the defendant. The plaintiff's gender, it said, was "merely coincidental" to the defendant's action. 716 F.2d at 1172. The court's reasoning indicates that the plaintiff could nevertheless prevail if he were able to prove that the defendant harassed him because he was a man.

District Court for the Eastern District of Michigan, came to this conclusion several months before Poe was reassigned to the Capitol Annex on the night shift. *Gobla* v. *Crestwood School District,* 609 F.Supp. 972, 978-79 (M.D. Pa. 1985); *Estate of Scott by Scott* v. *deLeon,* 603 F.Supp. 1328, 1332 (E.D. Mich. 1985).

On the issue of § 1983 liability of supervisory personnel, *Hays* v. *Jefferson County,* 668 F.2d 869 (6th Cir.), *cert. denied,* 459 U.S. 833 (1982), established that a supervisory official's failure to supervise, control, or train the offending individual is not actionable, unless the supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it." *Id.* at 874. *See also Bellamy* v. *Bradley,* 729 F.2d 416, 421 (6th Cir.) *cert. denied,* 469 U.S. 845 (1984).

Poe's sexual harassment claim fails on this latter score. Even assuming the allegations in her complaint are true, she has not averred that "any of the supervisory officials who [are] defendants in this case actively participated in or authorized any harassment" by Henderson. *Bellamy,* 729 F.2d at 421. At best, she has merely claimed that the appellants were aware of alleged harassment, but did not take appropriate action. This is insufficient to impose liability on supervisory personnel under § 1983. *Ibid.*

D

Finally, Poe contends that the appellants' decisions to change the conditions of her employment — assign-

ing two male coworkers to accompany her while she worked in the Capitol and then transferring her to the Capitol Annex — in response to her sexual harassment complaints constituted gender-based discrimination in violation of the equal protection clause.[7] Poe appears to argue that she was treated differently merely because she was a woman; that had the aggrieved party been a man, and the offending individual a woman, the appellants would have responded quite differently.

There can be little doubt that, before December 1984, a female public employee had a constitutional right to be treated on the same basis as a male employee. *Davis* v. *Passman,* 442 U.S. 228 (1979), made

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[7]Poe also argues that the appellants transferred her to the Capitol Annex in retaliation for filing her sex discrimination charge with the EEOC. Although we do not believe Poe is basing this claim on section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), our discussion of *Davis* v. *Scherer, supra* at 18-19, is dispositive in any event.

Instead, we understand her central contention to be that she was constructively demoted without notice or hearing, in violation of the due process clause of the fourteenth amendment. We will not consider this claim, however, because it is inadequately developed. Since the district court will consider the issue of qualified immunity further, Poe may develop her due process claim more fully on remand.

The district court may wish to explore the monetary disparity between Poe's night shift position in the Capitol and her position in the Capitol Annex. The Seventh Circuit has "expressed a reluctance to find a transfer to the same pay level to be a violation [of the due process clause] of the Fourteenth Amendment." *Greenberg* v. *Kmetko,* 840 F.2d 467, 475 (7th Cir. 1988) (en banc).

clear that sex discrimination against a public employee is a violation of the equal protection component of the due process clause of the Fifth Amendment, as long as that discrimination cannot be shown to serve important governmental objectives and is not substantially related to achievement of those objectives. *See Goodwin* v. *Circuit Court of St. Louis County, Missouri,* 729 F.2d 541, 546 (8th Cir. 1984) ("The right to be free of invidious discrimination on the basis of sex certainly is clearly established, and no one who does not know about it can be called 'reasonable' in contemplation of law.") This includes employment decisions relating to hiring and firing, *Davis,* 442 U.S. at 235, promotions, *Scott* v. *Overland Park,* 595 F.Supp. 520 (D. Kan. 1984), and transfers, *Goodwin,* 729 F.2d at 546-47. Appellants do not deny that the same is true under the fourteenth amendment. *Huebschen* v. *Department of Health and Social Services,* 716 F.2d 1167, 1171 n. 1 (7th Cir. 1983).

VI

Having determined that Poe's claims may be based on the equal protection clause of the fourteenth amendment, our inquiry is not at an end. This is so because an essential element of any equal protection claim is purposeful discrimination. *Personnel Administrator* v. *Feeney,* 442 U.S. 256, 276 (1979). Based on Poe's core claim that the appellants were animated by improper motives, the district court concluded that motive was a disputed issue which precluded summary judgment for the appellants on the basis of qualified immunity.

Although *Harlow* and its progeny eschewed inquiry into a defendant official's subjective intent, *see Davis* v. *Scherer,* 468 U.S. 183, 191 (1984) (*Harlow* "rejected the inquiry into state of mind in favor of a wholly objective standard"); *Mitchell* v. *Forsyth,* 472 U.S. 511, 517 (1985) (*Harlow* "purged qualified immunity doctrine of its subjective components"); *Malley* v. *Briggs,* 475 U.S. 335, 341 (1986) (Under *Harlow,* "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner."), it apparently did not rule out all consideration of the official's discriminatory intent or motive in cases where, as here, the existence of a violation is dependent on proof of such intent. As Judge (now Justice) Scalia wrote in *Halperin* v. *Kissinger,* 807 F.2d 180, 184 (D.C. Cir. 1986), whether conduct does violate clearly established rights will often turn on the intent with which the conduct is performed. He said: "And it is impossible to place '[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,' when clearly established law makes the conduct legal or illegal depending upon the intent with which it is performed." *Ibid.* (citation omitted).

The Ninth Circuit in *Gutierrez* v. *Municipal Court of Southeast Judicial District,* 838 F.2d 1031 (9th Cir. 1988), illustrated this point well:

> For example, if a public employer terminates a black employee because he is black, that act clearly

> violates federal constitutional and statutory law. If, however, the employer terminates the black employee because of incompetence, then the discharge obviously does not violate the law at all. The act itself — the act of discharge — is neutral; it is the motive or intent that makes the act both actionable and violative of clearly established law.

Id. at 1050 (citations omitted). Thus, the objective legal reasonableness of the public employer's conduct will turn, necessarily, on whether that conduct was motivated by racial, sexual or political animus or by a legitimate concern for workplace efficiency.

The question that remains, of course, is the scope of the Supreme Court's admonition against considering the defendant official's subjective intent. As Judge Scalia asked, perhaps rhetorically, is "the expansive language of *Harlow, Forsyth,* and *Davis* . . . to be taken seriously"? *Halperin,* 807 F.2d at 185. It may be significant that, since *Harlow,* the Supreme Court has not considered a case involving qualified immunity where motive or intent is a critical element of the offense. *See Gutierrez,* 838 F.2d at 1050 n. 25.[8] This may suggest that the present case is quite different from the one envisioned by *Harlow.*[9]

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[8]*Forrester* v. *White,* __ U.S. __, 108 S.Ct. 538 (1988) involved a claim to absolute immunity.

[9]It is interesting to point out that Justice Scalia in *Anderson* v. *Creighton,* __ U.S. __, __, 107 S.Ct. 3034, 3040 (1987), read

(continued on next page)

Although this area of the law is murky, we agree with Judge Scalia that we should view *Harlow* as prohibiting an inquiry into intent as it bears on a "defendant's knowledge of the state of the law;" but not as rejecting inquiry into motive or intent "unrelated to knowledge of the law (*e.g.*, racial or political antagonism)." *Halperin*, 807 F.2d at 186. *Accord*, *Turner* v. *Dammon*, __ F.2d __ (4th Cir. 1988) (Kaufman, J., dissenting). *See* Balcerzak, Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation, 95 Yale L.J. 126, 127 (1985) ("It is unlikely that the Court meant for *Harlow* to prevent a plaintiff from inquiring into the reasons behind an official's conduct when the substantive law controlling the plaintiff's claim makes the official's state of mind a necessary component of the constitutional violation.").

Thus, under *Harlow*, it is still impermissible to inquire whether the defendant official actually knew that his conduct was unlawful. But, we agree with those circuits that have recognized that a government

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(*footnote 9, continued from previous page*)

Harlow as seeking to "minimize" inquiry into an official's subjective intent, rather than seeking to "purge" or "reject" such an inquiry. As Judge Kaufman has noted recently, there is no indication in *Anderson* that Justice Scalia changed the views he expressed a year earlier in *Halperin*. *Turner* v. *Dammon*, __ F.2d (4th Cir. 1988) (Kaufman, J., dissenting). Of course, it is an open question whether a majority of Justice Scalia's colleagues would agree with him.

official's motive or intent in carrying out challenged conduct must be considered in the qualified immunity analysis, where unlawful motive or intent is a critical element of the substantive claim *Gutierrez* v. *Municipal Court of Southeast Judicial District,* 838 F.2d 1031, 1051 (9th Cir. 1988) ("where the lawfulness of a challenged act is dependent upon the actor's motive or intent, the purpose for which the act was undertaken must be analyzed and not just the act itself."); *Martin* v. *D.C. Metropolitan Police Department,* 812 F.2d 1425, 1433 (D.C. Cir. 1987) ("when the governing precedent identifies the defendant's intent (unrelated to knowledge of the law) as an essential element of plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant s alleged unconstitutional purpose.") (citation and footnote omitted); *Wright* v. *South Arkansas Regional Health Center, Inc.,* 800 F.2d 199 (8th Cir. 1986). *See Kenyatta* v. *Moore,* 744 F.2d 1179, 1185 (5th Cir. 1984) ("Because the [*Harlow*] Court did not . . . purge substantive constitutional doctrine of all subjective issues, it did not entirely eliminate subjective inquiry from every qualified immunity analysis: some right . . . might be violated by actions undertaken for an impermissible purpose but not by the same actions undertaken for permissible purposes.") (footnote omitted), cert. denied, 471 U.S. 1066 (1985). Thus, "in deciding whether a defendant is entitled to qualified immunity in cases in which unlawful motive is a critical element. the court must consider

the actor's intent in carrying out the act that is alleged to have resulted in the violation of the plaintiff's rights." *Gutierrez,* 838 F.2d at 1051.

Our discussion of the relevance of motive or intent is especially applicable to Poe's claim of sex discrimination in violation of the equal protection clause. Poe's core claim, as we read it, is that the appellants' conduct, particularly their decisions to assign her to work with two fellow janitors and later to transfer her to the Capitol Annex, in response to her sexual harassment complaints was motivated by gender-based animus. Here, as we have shown, there is no doubt that the right to be free from sex discrimination is protected by the equal protection clause of the fourteenth amendment. But in deciding whether the appellants violated clearly established rights, there must be an inquiry sensitive to their individual motivations. Without an intent to discriminate on the basis of sex, the appellants' decisions reflected at most an attempt at a temporary resolution of an ambiguous situation.

This case has already proceeded to discovery, so we have no occasion to discuss a plaintiff's pleading responsibilities where motive or intent is an essential element of the challenged conduct. *See Gutierrez,* 838 F.2d at 1051-52; *Hobson* v. *Wilson,* 737 F.2d 1, 26-29 (D.C. Cir. 1984), *cert. denied sub nom. Brennan* v. *Hobson,* 470 U.S. 1084 (1985). Where, as here, discovery has taken place and the defendant officials have moved for summary judgment on the basis of qualified

immunity, we believe the plaintiff must present direct evidence that the officials' actions were improperly motivated in order to have any hope of defeating the motion. *Martin,* 812 F.2d at 1435. The plaintiff, "to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for [her] allegation of unconstitutional motive." *Ibid.*

Because the law concerning the interplay between qualified immunity and impermissible motive was "far from clear," *Gutierrez,* 838 F.2d at 1052; *Martin,* 812 F.2d at 1436, at the time the district court made its ruling in this case, we believe the plaintiff should be given an opportunity to amend her response, if necessary, to appellants' motion for summary judgment to make the showing mandated by the foregoing discussion. Appellants should be given an opportunity to make any adjustments to the summary judgment motion as well.

VII

In conclusion, we set forth the district court's inquiry on remand. The district court's main task is to look to the undisputed facts in the record, viewed in a light most favorable to the non-moving party, in determining if there is a genuine issue as to whether the appellants' conduct violated clearly established constitutional rights.

On Poe's sex discrimination claim, the question is whether a reasonable official in the position of each appellant could have believed that transferring Poe to the Capitol Annex and assigning her to work with two other janitors was lawful, considering that gender-based employment decisions violate the equal protection clause (assuming those decisions do not serve important governmental objectives and are not substantially related to achievement of those objectives). If there is a genuine issue of material fact concerning an appellant's motivation for those decisions, and there is direct evidence that an appellant was motivated by Poe's gender, then summary judgment should be denied. If, on the other hand, Poe is unable to provide any direct evidence of gender-based animus, summary judgment must be granted for the appellants. *See, e.g., Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 204-205 (8th Cir. 1986).

We emphasize that the district court should not rule against the appellants merely for reaching the "wrong" decision in their investigation of Poe's complaint, even assuming such a judgment can be reached at this stage of the litigation. Rather, the court should take into account the investigations that were initiated, and the conclusions that were reached, and then consider whether the appellants reasonably could have concluded that their subsequent actions in assigning Poe to a crew of three and transferring her to the Capitol Annex did not violate Poe's legal rights. *See*

Garvie v. *Jackson*, 845 F.2d 647, 652 (6th Cir. 1988). The analysis for Poe's retaliation claim is similar.

Accordingly, the judgment of the district court is vacated and the case remanded for proceedings consistent with this opinion.

JONES, J., concurring. Because I find the majority opinion engages in more analysis than necessary to resolve this matter, I concur in the result only.

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Eastern District of Kentucky
FILED
JAN 14 1987
AT COVINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

CIVIL ACTION NO. 85-99

PATSY CAROLYN POE — PLAINTIFF

VS. **ORDER**

J. L. HENDERSON, ET AL — DEFENDANTS

On January 9, 1987, oral argument on defendants' motion for summary judgment was held in this matter, at Lexington. William Jacobs represented the plaintiff, and Edwin S. Hopson and Monte D. Gross represented the defendants. Charles Witcliffe of the Finance Cabinet was present as well. The court having heard counsel and being sufficiently advised,

IT IS ORDERED as follows:

1. That defendants' motion for summary judgment be, and it is, hereby DENIED;

2. That the parties will try to settle this matter and file a status report with the court on or before FEBRUARY 1, 1987;

3. That a final pretrial conference will be held in this matter on THURSDAY, MARCH 5, 1987 at 3:30 P.M. in Frankfort;

4. That trial of this matter shall commence on MONDAY, APRIL 20, 1987 at 9:30 A.M. in Frankfort, before Honorable Richard F. Suhrheinrich, Visiting Judge; and

5. That plaintiff is reminded of F.R.Civ.P. 11 and of 42 U.S.C. §1988 and shall detail the evidence against the various state officials in this final pretrial memorandum.

This 13th day of January, 1987.

/s/ William O. Bertelsman
JUDGE

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Eastern District of Kentucky
FILED
MAR 12 1987
AT FRANKFORT
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

CIVIL ACTION NO. 85-99

PATSY CAROLYN POE — PLAINTIFF

VS. **ORDER**

J. L. HENDERSON, ET AL — DEFENDANTS

On March 5, 1987, a final pretrial conference was held in this matter, at Frankfort. William C. Jacobs represented the plaintiff; Edwin S. Hopson and Monte D. Gross represented the defendants. The court having heard counsel and being sufficiently advised,

IT IS ORDERED as follows:

1. That the motion of defendants to reconsider this court's order denying summary judgment be, and it is, hereby DENIED;

2. That the motion of defendants for leave to file substitute page be, and it is, hereby GRANTED;

3. That the motion of plaintiff for leave to file an Amended Complaint be, and it is, hereby DENIED;

4. That the motion of plaintiff to reschedule pretrial conference or for additional time for compliance with the final pretrial conference order be, and it is, hereby DENIED as moot;

5. That, the court having held that the remaining defendants may have violated the plaintiff's clearly established rights and hence are not qualifiedly immune, and the defendants having indicated a desire to take an appeal on this issue, the trial date of Monday, April 20, 1987 at 10:00 A.M. be, and it is, hereby CONTINUED pending resolution of this issue.

This 11th day of March, 1987.

/s/ William O. Bertelsman
WILLIAM O. BERTELSMAN,
JUDGE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

PATSY CAROLYN POE, PLAINTIFF,

v. CIVIL NO. 85-99

J.L. HENDERSON, et al., DEFENDANTS.

AMENDED ANSWER TO THE COMPLAINT

Defendants, J. L. Henderson, Donnie Haydon, Robert S. Smither, John S. Spicer, Lowell Clark, James E. Stewart, Tony Miller, Gordon Duke, Ventra Hammond, Thomas C. Greenwell, and George Russell, by counsel, for their Amended Answer to the Complaint herein, state as follows:

FIRST DEFENSE

Defendants reiterate and incorporate by reference as if fully set out herein all defenses previously asserted in their Answer to the Complaint herein.

SECOND DEFENSE

Some of the Defendants, as executive officials of the State, are immune from personal liability.

WHEREFORE, Defendants, J.L. Henderson, Donnie Haydon, Robert S. Smither, John S. Spicer, Lowell Clark, James E. Stewart, Tony Miller, Gordon Duke, Ventra Hammond, Thomas C. Greenwell, and George Russell, demand that the Complaint herein be dismissed with prejudice and held for naught; that it recover its costs herein expended, including a reasonable

attorney's fee; and all other relief to which it may appear to be entitled.

Of Counsel:

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* * * * * * *